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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

TULARE COUNTY DEPARTMENT
OF HEALTH SERVICES,

Petitioner,

vs.

LYDIA MARY MORAN,

Respondent.

On Petition For Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED FOR REVIEW

I. Whether a settlement agreement of a Title VII claim between an employee of a public entity and the public entity entitles the employee to reinstatement *under any circumstances* even though that employee requested and was placed on medical leave for psychological reasons, and has been currently diagnosed as psychologically unfit to work, because the means by which the current medical information was obtained, a fitness for duty exam, was not explicitly mentioned in the agreement itself.

LIST OF PARTIES

The caption in this case contains the names of all the parties.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE 1

STATEMENT OF THE CASE 2

A. Facts Giving Rise to this Case 2

B. The Initial Proceedings 5

C. The Appeal 6

REASONS WHY CERTIORARI SHOULD BE GRANTED 7

Review is Warranted Because The Opinion By the Ninth Circuit Court of Appeals is in Conflict with its Own Decisions 7

A. The Ninth Circuit Court of Appeals has ruled that medical fitness examinations in employment are appropriate 7

B. The Ninth Circuit Court of Appeals has held that contracts must be interpreted according to the law of the jurisdiction in which the contract was made, yet failed to follow the law of the State of California and its own precedent in reviewing the settlement agreement and surrounding circumstances in this matter 8

TABLE OF CONTENTS – Continued

Page

C. The rigid position adopted by the Ninth Circuit Court of Appeals is in conflict with its own commitment and that of this Court favoring settlement of disputes 13

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Ahern v. Central Pacific Freight Lines, 846 F.2d 47 (1988) 13

Automobile Salesman's Union v. Eastbay Motor Car Dealers, Inc., 10 Cal.App.3d 419 (1970) 10, 11

Crestview Cemetery Assn. v. Dieden, 54 Cal.2d 744 (1960) 10

Devins v. Goldberg, 33 Cal.2d 173 (1948)..... 9

Hernandez v. Badger Construction Equipment Co., 28 Cal.App.4th 1791 (1994)..... 12

Kennecott Corp. v. Union Oil Co., 196 Cal.App.3d 1179 (1987)..... 12

Kokkonen v. Guardian Ins. Co. of America, 511 U.S. 375 (1994) 5

Marek v. Chesny, 473 U.S. 1 (1985)..... 14

Miller v. Fairchild Industries (Miller I), 797 F.2d 727 (9th Cir. 1986).....8, 9, 10, 11

Pacific Gas & Electric Co. v. G.W. Thomas Drayage etc. Co., 69 Cal.2d 33 (1968) 10

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 6

United States v. McInnes, 556 F.2d 436 (9th Cir. 1977)..... 14

Woodbine v. Van Horn, 29 Cal.2d 95 (1946) 11

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 14

Yin v. State of California, 95 F.3d 864 (9th Cir. 1996).....7, 8

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 2000e et seq. 2

California Labor Code § 1655 9

California Labor Code § 1656 9

California Labor Code § 6306, subd. (a) 9

Fourteenth Amendment to the United States Constitution, Section 1 1

Ninth Circuit Rule 33-1 14

PETITION FOR A WRIT OF CERTIORARI

The County of Tulare respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App. 1-2) and its order denying the County of Tulare's petition for rehearing (App. 16) are unreported. The opinion of the district court (App. 12-15) is unreported.

JURISDICTION

The court of appeals entered its memorandum opinion on October 25, 1996 (App. 1-2) and, thereafter, entered its order denying the County of Tulare's petition for rehearing on April 23, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS IN ISSUE

Fourteenth Amendment to the United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964, Title 42 United States Code section 2000e et seq. (Relevant sections set forth in full in App. 17-21.)

STATEMENT OF THE CASE

A. Facts Giving Rise to this Case

Lydia Mary Moran was an Office Assistant with the Tulare County Department of Health Services in Visalia, California from 1985 to 1990, when she submitted her resignation. Prior to the effective date of the resignation, Ms. Moran requested and was granted a transfer to the Tulare County Department of Social Services as an Office Assistant where she worked until she became ill in June 1992. At that time, she was diagnosed by various mental health professionals (including a psychiatrist and a licensed clinical social worker) as suffering from major depression with psychotic features, involutional dysthymia, and stress-related symptoms. In June 1992, she was hospitalized for ten days. She did not return to work and received state disability. She also filed a workers compensation action, alleging she was disabled due to a psychological condition. In August 1992, Ms. Moran was diagnosed by a psychiatrist as being "grossly psychotic"

and hospitalization was recommended. In November 1992, Ms. Moran's mood and thought processes were dysfunctional and her insight and judgment were poor, but she was refusing to take prescribed medications, had not entered the hospital as recommended, and had not pursued out-patient psychotherapy. Ms. Moran's psychiatrist stated he did not envision Ms. Moran returning to gainful employment. In 1993, Ms. Moran began receiving SSI payments due to her psychiatric disability.

In November 1990, Ms. Moran filed a complaint with the U.S. Equal Employment Opportunity Commission, alleging discrimination by the Tulare County Health Services Department because of her ancestry (Hispanic). She received a notice of right to sue and, in October 1992, Ms. Moran filed a complaint in the U.S. District Court for the Eastern District of California. The complaint was amended once and, for a period of a year, Ms. Moran attempted to obtain counsel to represent her. She was unsuccessful in obtaining counsel and the matter proceeded with her acting pro se.

The discrimination action [in conjunction with the workers' compensation action] was settled in open court and approved by the U.S. Magistrate on June 10, 1994. This agreement was reduced to writing and signed on July 26, 1994. The settlement agreement provided for no admission of wrongdoing by the County, payment of money to Ms. Moran, establishment of a bilingual services policy by the County of Tulare, a statement that Ms. Moran would be considered to be on a leave of absence, and a restatement of the County of Tulare's Personnel Rule with regard to Ms. Moran's already-existing right to reinstatement after such a leave. Ms. Moran was paid a

total of forty-five thousand dollars [$45,000.00] in settlement of her discrimination and workers' compensation claims.

In November 1994, Ms. Moran appeared at the County of Tulare's Personnel Department with a slip from a general practitioner [not a psychiatrist or psychologist] stating she could return to work. Pursuant to the County of Tulare's policy requiring all employees who returned from medical leave to demonstrate that the employee is medically able to work, the Personnel Director requested that Ms. Moran receive a "fitness for duty" examination. Ms. Moran consented to such an examination, and was examined by a psychologist, who found Ms. Moran was "not psychologically fit to return to work at this time", and would not be able to work without first undergoing the treatment she had continuously refused since 1992. That psychologist diagnosed Ms. Moran as having Depressive Disorder in partial remission, and having Histrionic, Dependent and Passive-Aggressive Personality Disorder traits.

Only after being advised of the psychologist's finding, Ms. Moran objected to having been required to undergo the fitness for duty examination in the first instance, contending that, under the settlement agreement, the County of Tulare was required to reinstate her without having to consider her fitness to work and that the County's insistence on a fitness for duty examination was inappropriate and unjustified. The County of Tulare maintained that fitness for duty is a reasonably implied term of the settlement agreement and that a fitness for duty examination is required in order to fulfill the

County's duty to its employees to avoid placing them in a position with an unreasonable risk of harm.

B. The Initial Proceedings

The County of Tulare filed a motion with the U.S. District Court seeking enforcement and instructions relating to the settlement agreement. The motion was referred to a Magistrate Judge for report and recommendation. On May 23, 1995, the Magistrate Judge found that, in light of the current psychologist's report and the prior psychiatrist's report, the County was acting with appropriate caution and responsibility in seeking a determination of whether Ms. Moran was psychologically fit to return to duty and that such a condition was an appropriate condition which should reasonably be implied as a term of the settlement agreement. After considering the recommendations by the Magistrate Judge and objections by Ms. Moran, and conducting a de novo review of both the agreement and the record, U.S. District Judge Robert E. Coyle, concurring with the Magistrate's recommendation that an implied condition of the settlement agreement was that Ms. Moran submit to a fitness for duty examination in order to determine whether she was fit to work, concluded that the settlement agreement was not breached when Ms. Moran was required to undergo an examination by a mental health professional. The U.S. District Judge granted the County of Tulare's motion to enforce the settlement agreement and petition for instruction. The U.S. District Judge found that the court retained jurisdiction over the settlement agreement pursuant to *Kokkonen v. Guardian Ins. Co. of America*, 511 U.S. 375, 114 S.Ct. 1673 (1994).

C. The Appeal

On July 20, 1995, Ms. Moran appealed from U.S. District Judge Coyle's decision. Ms. Moran's request for oral argument was denied and no oral argument was held. In a decision filed October 25, 1996, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit conducted a de novo review of the settlement agreement [but apparently did not review the entire record de novo] and, in a memorandum opinion, concluded that the language in the settlement agreement was clear and unambiguous and did not imply that, before Ms. Moran can be reinstated, she must submit to a psychological examination to determine if she is fit to return to work. The Court of Appeals reversed the U.S. District Court's order granting the County of Tulare's motion to enforce the settlement agreement. The Court of Appeals found jurisdiction pursuant to the collateral order doctrine, citing as authority *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424 (1985).

On November 8, 1996, the County filed a Petition for Rehearing with Suggestion for Rehearing En Banc. In the Petition, the County pointed out that the Rule of Practical Construction, recognized under both state and federal law, provides that the construction of a contract as shown by the acts and conduct of the parties in regard to the contract before any controversy arose as to its meaning is to be used to determine the meaning of the contract regardless of whether the literal wording of an agreement is clear and unambiguous. On April 23, 1997, the U.S. Court of Appeals for the Ninth Circuit denied the County's Petition for Rehearing. This Petition for Writ of Certiorari followed.

REASONS WHY CERTIORARI SHOULD BE GRANTED

Review is Warranted Because The Opinion By the Ninth Circuit Court of Appeals is in Conflict with its Own Decisions

A. The Ninth Circuit Court of Appeals has ruled that medical fitness examinations in employment are appropriate.

Just six weeks prior to the Ninth Circuit Court of Appeal's memorandum opinion in this case, another Ninth Circuit panel decided *Yin v. State of California*, 95 F.3d 864 (9th Cir. 1996). The holding in *Yin* is clearly inconsistent with the Ninth Circuit's holding in this case. In *Yin*, an employee had a history of medical problems which required her to be off work. After yet another absence of thirty consecutive days, Yin was directed to submit to an independent medical examination. She filed suit to keep the State of California, her employer, from ordering her to submit to the examination or disciplining her for refusal. The Ninth Circuit found that the employer had good cause to determine whether Yin was medically able to perform her job. The Court stated:

> We conclude that when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability. (*Id.*, p. 868.)

The Court went on to conclude that the interest of the State in determining whether and to what extent Yin was

medically able to work overrode Yin's privacy interest. The Ninth Circuit's holding in this case is at direct odds with the holding in *Yin*. If Ms. Moran had already been working and, while working, demonstrated a reasonable cause for concern as to her medical fitness, under *Yin* she could have been directed to undergo a fitness for duty examination. If she had been on leave which was not included in a settlement agreement, presumably the result would be the same. However, under the holding in this case, because the agreement did not explicitly state that Ms. Moran, in order to be reinstated, had to be medically able to actually perform work, no examination or even inquiry will be permitted. In addition to the circular absurdity of that result, the decision in this case is entirely inconsistent with the holding and policy expressed in *Yin*.

B. The Ninth Circuit Court of Appeals has held that contracts must be interpreted according to the law of the jurisdiction in which the contract was made, yet failed to follow the law of the State of California and its own precedent in reviewing the settlement agreement and surrounding circumstances in this matter.

The Ninth Circuit Court of Appeals, in *Miller v. Fairchild Industries (Miller I)*, 797 F.2d 727 (9th Cir. 1986), regarding interpretation of a settlement agreement in a Title VII discrimination case, stated as follows:

> Settlement agreements have the attributes of contracts, and they should be construed as such.[Citation omitted.] In construing the settlement agreements here, **we apply principles of**

California contract law. (Emphasis added.) (*Ibid*. at p. 733.)

The Court of Appeals for the Ninth Circuit failed to apply California law generally in regard to implied conditions, and specifically in regard to the Rule of Practical Construction. First, as the Court of Appeal pointed out in *Miller I, supra,* a settlement agreement is essentially a contract. Under California statute, those terms which are necessary to make a contract reasonable, or are necessary to carry it into effect, are implied conditions. (California Labor Code §§ 1655, 1656.)

All employers in California are required by statute to provide employment for employees which is free from danger to the life, safety or health of those employees. (California Labor Code § 6306, subd. (a).) Further, under California common law, an employer has a duty to furnish an employee with a reasonably safe work place in which to work. (*Devins v. Goldberg*, 33 Cal.2d 173 (1948).) Since all employers are legally required to ensure their employees are provided employment which is medically safe, clearly it is a reasonably implied condition of the settlement agreement that to reinstate Ms. Moran to employment it must be medically safe and that she be able to actually work.

The Court of Appeal, in reaching its conclusion regarding the implied condition set forth above, also ignored the Rule of Practical Construction, a principle both of California law and of the Ninth Circuit. It is a well-established principle of California contract law that when the parties to a contract perform under it and demonstrate by their conduct that they knew what they

were talking about, the courts should enforce the parties' intent. This is known as the "rule of practical construction". (*Crestview Cemetery Assn. v. Dieden*, 54 Cal.2d 744, 754 (1960).) The rule is based on the "common sense concept" that actions speak louder than words. (*Id.*)

Even when the actual words of a contract standing alone might mean one thing to a court, where the parties by their actions have demonstrated that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. (*Id.*) Specifically in regard to the proposition that a court should not look beyond the literal wording of a document,

> [a] rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained. (*Automobile Salesman's Union v. Eastbay Motor Car Dealers Inc.*, 10 Cal.App.3d 419, 423 (1970), citing *Pacific Gas & Electric Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 37 (1968).)

The facts in *Miller I, supra,* support the County of Tulare's position. In that case, plaintiffs settled a Title VII case in which they alleged discrimination based on race. Terms of the no-fault settlement included promises by the employer to provide transfers, performance and merit reviews and training opportunities. Two months after the settlement agreement was signed, the plaintiffs were laid off. The plaintiffs alleged breach of the settlement agreement; the defendants claimed that the agreement did not

consider layoff or seniority. Neither layoff nor seniority were explicitly discussed in the agreement.

The Court held that the fact that the agreement did not explicitly address layoff was not determinative. The Court found given that the plaintiffs had waived their right to sue in exchange for future employment opportunities, it was reasonable to imply in the agreement that the plaintiffs had some expectation that their employment would continue.[1]

Another way to view the matter is that the parties, by their actions, **create** an ambiguity in the contract. "The ambiguity can be created where the parties have demonstrated **by their actions and performance** what the contract meant to them, even though the words, standing alone, might have a different meaning to the court". (Emphasis added.) (*Ibid.* at p. 424.)

Not surprisingly, given the Rule of Practical Construction set forth above, the acts and conduct of the parties **before** any controversy has arisen is entitled to great weight and, when reasonable, is to be adopted and enforced by the court. (*Woodbine v. Van Horn*, 29 Cal.2d 95, 104 (1946); *Automobile Salesmen's Union v. Eastbay, Motor Car Dealers Inc., supra*, 10 Cal.App.3d at 424.) In fact, "[t]he conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the **most reliable evidence** of the parties'

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[1] We note that this case also supports Petitioner's original contention on appeal that the parties and the Court may reasonably imply terms to an agreement which are not explicitly stated. In the *Miller I* case that principle worked to the advantage of the plaintiffs; Petitioner seeks the same protection.

intentions." (Emphasis added.) (*Hernandez v. Badger Construction Equipment Co.* 28 Cal.App.4th 1791, 1814 (1994), citing *Kennecott Corp. v. Union Oil Co.*, 196 Cal.App.3d 1179, 1189 (1987).)

Ms. Moran's conduct before she was refused reinstatement is entirely consistent with the County of Tulare's interpretation of the Settlement Agreement as including a reasonably implied condition that Ms. Moran be medically fit to work before being reinstated. Ms. Moran, by the terms of the Settlement Agreement, was an employee on medical leave both before and after the agreement was signed and before she sought reinstatement. She had a history of job-related medical problems, which had resulted in her being unable to work before this matter was settled. The County of Tulare had a policy, which had been in place well before the settlement of Ms. Moran's claims, of requiring all employees who returned from medical leave to demonstrate that the employee is medically able to work.

At the time that Ms. Moran came to the Personnel Department seeking reinstatement under the Settlement Agreement, she brought to the Personnel Department a **medical release** from her doctor. That was done at her own instigation. Ms. Moran clearly understood, at the time she first sought reinstatement, **before** there was any controversy over the settlement terms, that to be reinstated she had to be medically able to work. She agreed to go to the examination scheduled by the County; her only expressed concern was the time delay. It was only **after** Ms. Moran had undergone and "failed" the examination that she complained that such was not required under the agreement.

Ms. Moran had [and for that matter still has] available to her an administrative appeal procedure, as do all County employees. Ms. Moran refused to follow the procedure, instead insisting only **after** the examination by Dr. Reed that she was not required to demonstrate fitness at all but was entitled to reinstatement under any circumstances by virtue of the agreement.

Under California law, the most reliable evidence of what the parties intended is how they conducted themselves in regard to the agreement before any controversy arose. Using that test, it is clear that **both** Ms. Moran and the County of Tulare understood that she was on leave, that she had a history of medical problems, and that she needed to demonstrate medical fitness before she could be reinstated to any employment. The County of Tulare has never wavered from that position. Ms. Moran only deviated from that position after it was determined she was not medically able to safely return to work.

C. The rigid position adopted by the Ninth Circuit Court of Appeals is in conflict with its own commitment and that of this Court favoring settlement of disputes.

The Ninth Circuit Court of Appeals has long expressed its commitment to the rule that the law favors and encourages settlement agreements. (*Ahern v. Central Pacific Freight Lines*, 846 F.2d 47, 48-9 (1988).) The Court has stated, citing this court as authority:

> We are committed to the rule that the law favors and encourages compromise settlements. (Citation.) We recently noted that there is an **overriding public interest** in settling and quieting

> litigation. (Citation.) (Emphasis added, citations omitted.) (*United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977).)

The Ninth Circuit Court of Appeals has found settlement to be of such importance that it has established its own appellate settlement program. (Circuit Rule 33-1.)

As this Court has noted, it is both desirable and common for cases such as this case to be settled by agreement. (See, e.g., *Marek v. Chesny*, 473 U.S. 1, 10, 105 S.Ct. 3012, 3017 (1985); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 305, 106 S.Ct. 1842, 1863 (1986) (dissenting opn.).) However, if the brief ruling of the Court of Appeal for the Ninth Circuit is allowed to stand in this case, it will dictate an unsound result which was clearly never intended by the parties. Literally interpreted, the County is required to reinstate Ms. Moran to employment no matter what her physical or mental condition may be and without regard to whether or not she can do the job.

The rigid interpretation of the Settlement Agreement required by the decision is inconsistent with this Court's stated policy of encouraging the voluntary settlement of disputes. It is only reasonable to expect that any employee must be medically able to do his or her work. To hold otherwise only because of the Court of Appeal's literal interpretation of a settlement agreement will certainly discourage parties from voluntarily settling their disputes in similar cases.

CONCLUSION

If this decision is allowed to stand, the citizens of the County of Tulare will be faced with reinstatement of, or in the alternative **additional** payments of money to, an employee who was, at the time of her request for reinstatement, medically unable to work according to a licensed medical professional. The County of Tulare's Personnel Rules and system will be applied without uniformity; there will be one set of rules for all other employees, and another set of rules for Ms. Moran. California State law will not be applied appropriately; an employee will be reinstated even though she was not medically able to work. The decision of the U.S. Court of Appeals for the Ninth Circuit will create legal, administrative and financial havoc for the County of Tulare, its employees and its taxpayers. It will certainly chill the likelihood of future settlements by the County of Tulare in similar cases, and likely will similarly chill other public entities.

Based on the foregoing, petitioners respectfully submit that this petition for writ of certiorari should be granted.

Dated: July 17, 1997

Respectfully submitted,

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LYDIA MARY MORAN, Plaintiff-Appellant, v. COUNTY OF TULARE, Department of Health Services, Defendant-Appellee.	No. 95-16367 D.C. No. CV-92-05694-REC MEMORANDUM* (Filed Oct. 25, 1996)

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Submitted July 29, 1996**

Before: HUG, Chief Judge, SCHROEDER and TASHIMA, Circuit Judges.

Lydia Mary Moran appeals pro se the district court's order granting defendant's motion to enforce the settlement agreement. We have jurisdiction pursuant to the collateral order doctrine, *see Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985), and we reverse.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Moran's request for oral argument is denied.

After a de novo review of the settlement agreement, *see Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir.), *cert. denied*, 501 U.S. 1252 (1991), we conclude that the language of paragraph 9 of the settlement agreement is clear and unambiguous. It does not imply that, before Moran can be reinstated, Moran must submit to a psychological examination to determine if she is fit to return to work. Accordingly, we reverse the district court's order granting defendant's motion to enforce the settlement agreement.

REVERSED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

LYDIA MARY MORAN of the State of California, Plaintiff, v. TULARE, COUNTY OF, DEPARTMENT OF HEALTH SERVICES, Defendants.	CV F-92-5694 DLB REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION TO ENFORCE SETTLEMENT AGREEMENT AND PETITION FOR INSTRUCTION (Filed May 23, 1995)

Defendants brought this motion seeking enforcement and/or instructions relating to the settlement agreement entered into between the parties on July 26, 1994. This motion was referred to the undersigned Magistrate Judge for report and recommendation by order of the Honorable Robert E. Coyle, United States District Court Judge, on April 5, 1995.

BACKGROUND

Plaintiff filed her original complaint *pro se* on October 16, 1992 and after several continuances of the scheduling conference, owing to attempts to obtain counsel to represent Plaintiff and after hearing on Defendants' motion for more definite statement, Plaintiff filed her amended complaint on March 11, 1994. On June 10, 1994, a Settlement Conference was held in the chambers of the undersigned at which time the parties reached agreement of terms of

settlement which were recited in open court on the record and agreed to by Plaintiff and by Ms. Kathleen Bales-Lang, principal attorney for the Tulare County Counsel. Subsequently, a written Settlement Agreement and Release reflecting the terms of the settlement was drafted and executed by the parties on July 26, 1994. The written Settlement Agreement and Release was attached as an exhibit to Plaintiff's request for dismissal of the action which was lodged on August 8, 1994 and adopted by the court on August 9, 1994.

The terms of the settlement agreement which are in dispute on the instant motion is paragraph number 9 on page 8 which read as follows:

> 9. Leave and Reinstatement: LYDIA MORAN shall be considered to be on leave of absence without pay pursuant to Tulare County Personnel Rule 6.10.1, for a period of one year from June 10, 1994. LYDIA MORAN shall have the right of reinstatement to a vacant position of Office Assistant II with COUNTY OF TULARE until June 10, 1995. If LYDIA MORAN has not reinstated to employment on or before June 10, 1995, she shall be deemed to have resigned her employment, and her employment shall terminate on June 11, 1995. In the event that her employment is terminated pursuant to this paragraph, LYDIA MORAN hereby waives any rights to administrative appeal for dismissal for cause pursuant to Tulare County Personnel Rule 12.
>
> Settlement and Release Agreement Page 8, paragraph 9, lines 7-18.

It is undisputed that in November 1994, Plaintiff contacted the Tulare County Personnel Department and

sought reinstatement pursuant to the above quoted provision of the Settlement Agreement and Release. In connection with her request for reinstatement Plaintiff presented a written release to return to work form signed by her personal physician, Dr. Miyakawa. The form signed by Dr. Miyakawa indicated that Plaintiff could return to work as of December 1, 1994 at her present job and duties and that no further treatment was required.

In response to her request, and Dr. Miyakawa's release, the Tulare County Personnel Department informed Ms. Moran that she would be required to undergo an examination by a mental health professional chosen by the County in order to ensure that she was fit to return to work. Personnel Department made arrangements for Plaintiff to receive a "fitness for duty exam" from Bruce T. Reed, PHD. After interviewing Ms. Moran, reviewing the records of her prior mental health treatment and evaluations and conducting psychological tests Mr. Reed was of the opinion that Ms. Moran was not fit to return to duty without further counseling.

Ms. Moran contends that the examination was not appropriately conducted, disagrees with Mr. Reed's opinion and objects that the County should have used a neutral doctor.[1] Although, pursuant to its policy and

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[1] The declaration of Vernon Ribeiro indicates that Mr. Reed was chosen by a referral from Fimbres Adjustors, the County's third party worker's compensation administrators. Furthermore, the declaration of Jim Brinkerhoff, Tulare County Personnel Director, indicates that he had no conversations or contact with Mr. Reed "regarding the content or desired outcome of Ms. Moran's examination and did not know until

practice, the County offered Ms. Moran a third "tie breaker" examination by a mental health professional and also agreed that she could chose the third examiner from a list to be provided by the County, Ms. Moran refused. According to declarations filed in support of the Defendants' motion the County's standard procedure for administrative appeals from determinations relating to fitness of duty is to obtain a third "tie breaker" opinion in the event that the first two opinions differ regarding the employees fitness to return to duty.

Plaintiff contends that the above quoted provision of the settlement agreement and release provides for her unconditional reinstatement and the County's insistence on a "fitness for duty" examination is inappropriate and unjustified. The County maintains that fitness to return to duty is an implied term of the settlement agreement and release and that such an examination is required in order to fulfill the County's duty to its employees to avoid placing them in a position with an unreasonable risk of harm.

JURISDICTION

A District Court does not have the "inherent power" to enforce a settlement agreement between the parties which resulted in the dismissal of an action unless " . . . the parties' obligation to comply with the terms of the settlement agreement. . . . [is] made part the order of

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after the exam who the examining physician was". (Brinkerhoff declaration page 2, lines 15-17.)

dismissal – either by separate provision (such as a provision 'retaining jurisdiction' over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist." *Kokkonen v. Guardian Life Ins. Co. of America*, ___ U.S. ___, 114 Sup.Ct. 1673, 1977 (1994).

Contrary to the facts of *Kokkonen* the Settlement Agreement and Release in this case was incorporated as part of Plaintiff's request for dismissal and filed as an attachment to that request. Additionally, paragraph 4 of the Settlement Agreement and Release provides as follows:

> For Continuing Jurisdiction: The federal court shall retain jurisdiction over the settlement in this matter to insure that the policy referenced in paragraph 3 is in fact implemented, and that same contains the minimum requirements specified in paragraph 3. The court shall retain no other jurisdiction over the contents of the policy. Once said policy has been implemented, the court's jurisdiction over this agreement shall terminate, provided that all other terms and conditions of this agreement have been complied with.
>
> Settlement and Release Agreement, pages 6-7, paragraph 4.

While it is apparent from a plain reading of paragraph 4 that the parties intended the court to retain jurisdiction over the settlement agreement with respect to the bilingual employee policy the fact that the agreement conditioned the termination of the court's jurisdiction over the

agreement upon the fulfillment of all other terms and conditions of the agreement reflects the parties intent that the court retain jurisdiction over the entire agreement to enforce its terms at least until the bilingual employee policy had been implemented. Since it appears from the declarations filed by Defendants in support of their motion that the policy regarding bilingual employees has not yet been implemented it appears that this court has jurisdiction to enforce the terms of the settlement agreement.

FITNESS FOR DUTY EXAMINATION

As stated above, Plaintiff maintains that paragraph 9 of the settlement agreement regarding her right to reinstatement gives her the right to unconditional reinstatement to a vacant position of Office Assistant II. However, in argument on this motion Plaintiff conceded that if she were physically unable to perform the task of Office Assistant II the right to reinstatement would not apply. As Defendant points out in its points and authorities all contracts are subject to implied conditions. The question remains, however, whether the instant agreement, under the facts as presented, is subject to a implied condition that Plaintiff take a fitness for duty examination and be certified as fit to return to duty by a County employed examiner.

In support of her argument that such an examination is unnecessary and inappropriate under the terms of the agreement, Plaintiff points out the terms of the settlement and release in her worker's compensation action provide

"there is no need for future medical care".[2] Furthermore, the compromise and release in the worker's compensation claim provided that "settlement herein is based upon the agreed medical examination report of Dr. Ronald Lowell dated June 2, 1994, which the DEU has rated as follows: 1.4-15-40X-22-28:2 equals $15,820.00". From a reading of Dr. Reed's report (which was submitted by Defendants in support of this motion) it appears that Dr. Lowell's supplemental report found that Ms. Moran was permanent, stationary and rateable as of September 7, 1993 and that while he noted permanent psychiatric impairment he did not recommend further treatment and did not believe that "Ms. Moran would be able to return to employment for Tulare County. To do so would only reactivate traumatic memories and she would soon be more symptomatic on a psychiatric basis and unable to continue her employment." (Dr. Reed's report at page 6 quoting from Dr. Lowell's report.) Thus, while the opinion referred to and relied on in rating Ms. Moran on her worker's compensation claim found that no future medical care was necessary, it also found that returning to work might be harmful to Ms. Moran's psychiatric condition. In his report Dr. Lowell further stated that "I believe she will continue to be resistive to any kind of psychiatric or psychological care and will also be resistive to vocational rehabilitation services". (Dr. Reed's report at page 6, quoting from Dr. Lowell's supplemental report.)

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[2] Settlement of Ms. Moran's worker's compensation action was part and parcel of the settlement of her claims in this action and incorporated in the Settlement Agreement and Release. Furthermore her claims in that proceeding were related to her claims in this action.

In light of Dr. Reed's and Dr. Lowell's reports and opinions it appears that the County was acting with appropriate caution and responsibility in seeking a determination of whether Ms. Moran was psychologically fit to return to duty. This condition, especially in light of the past history, is an appropriate condition which should reasonably be implied as a term of the Settlement Agreement and Release.

The administrative appeal by examination by a third "tie breaker" mental health professional remains available and if Ms. Moran desires reinstatement she must pursue it. The question might still remain after the examinations whether they were fair and the conclusions justified however, Ms. Moran must first participate in the tie breaker examination before any such claims may be raised. The County's motion should be granted.

This report and recommendation is submitted to the Honorable Robert E. Coyle, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 631 *et seq.* and Rule 305 of the Local Rules of Practice for the Eastern District of the United States District Court for the Eastern District of California. Within ten days after being served[3] with a copy, any party may serve on opposing counsel and file with the court written objections to such proposed findings and recommendations. Such a document should be captioned "Objections to Magistrate's Report

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[3] If service is effectuated by mail, three days shall be added to the time for filing objections to the report and recommendation. *See*, Rule 6(e) of the Federal Rules of Civil Procedure and Rule 136 of the Local Rules of the United States District Court for the Eastern District of California.

and Recommendations." Replies to the objections shall be served and filed within ten (10) days after service[4] of the objections. The court will then review the magistrate's ruling pursuant to 28 U.S.C. § 636(b)(1).

FAILURE TO FILE OBJECTIONS WITHIN THE SPECIFIC TIME WAIVES THE RIGHT TO APPEAL THE MAGISTRATE JUDGE'S FACTUAL FINDINGS, BUT WILL NOT AFFECT YOUR RIGHT TO APPEAL THE CONCLUSIONS OF LAW MADE BY THE MAGISTRATE JUDGE IF ADOPTED BY THE DISTRICT COURT.

DATED: 5/18/95

/s/ Dennis L. Beck
DENNIS L. BECK
U.S. MAGISTRATE JUDGE

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[4] Three days shall be added to the time for filing a reply if service of the objections to the Magistrate Judge's report and recommendation is accomplished by mail. *See,* n. 1.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LYDIA MARY MORAN, Plaintiff, v. TULARE, COUNTY OF, DEPARTMENT OF HEALTH SERVICES, Defendant.	No. CV-F-92-5694 REC ORDER RE DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AGREEMENT AND PETITION FOR INSTRUCTION (Filed July 12, 1995)

On May 23, 1995, the United States Magistrate recommended that this court grant defendant's Motion to Enforce Settlement Agreement and Petition for Instruction.

On May 30, 1995, plaintiff timely filed objections to the recommendation. Defendant timely filed an opposition to plaintiff's objections on June 2, 1995.

The issues involved in this recommendation are whether this court has jurisdiction to hear this motion given the wording of the provision in the settlement agreement providing for continuing jurisdiction and, if the court has jurisdiction, whether the settlement agreement has been breached.

The court has conducted a *de novo* review.

A. Jurisdiction.

The court has reviewed the record herein and concurs with the Magistrate's conclusion that the court has jurisdiction to hear defendant's motion. However, as explained below, the court reaches this conclusion for reasons different than those articulated by the Magistrate.

On June 27, 1994, the court issued its Order Re Defendant's Motion to dismiss Amended Complaint. The motion was one for dismissal of the causes of action for employment discrimination based on sex and age and for dismissal of pendent causes of action. For some reason, the motion was granted by concluding that "summary judgment for defendant is granted". The Order also directed entry of judgment. Accordingly, judgment for defendant was entered on June 28, 1994.

However, the direction for entry of judgment and the entry of judgment were in error because plaintiff's claims for employment discrimination on the grounds of national ancestry and of reprisal remained in the case. Moreover, summary judgment should not have been granted but, rather, dismissal of the causes of action the subject of the motion.

On August 11, 1994, plaintiff filed a document captioned "Plaintiff's Request for Dismissal". This Request for Dismissal states: "Please dismiss this action. See attached Settlement Agreement and Release with Defendant and Respondent County of Tulare." Stamped at the bottom of the Request for Dismissal is a stamped "It is so Ordered" dated and signed by the undersigned on August 9, 1994. No judgment of dismissal has ever been entered.

The court concludes that the judgment entered on June 28, 1994 should be vacated on the ground that it was entered in error because the court's order directing entry of summary judgment was in error. Because no judgment dismissing the action pursuant to the settlement agreement has been entered, the court concludes that the court still retains jurisdiction notwithstanding the interpretation of the provisions of the settlement agreement providing for retention of jurisdiction in light of *Kokkonen v. Guardian Life Ins. Co. of America*, ___ U.S. ___, 114 S.Ct. 1673 (1994). This is because the entry of judgment must be a separate document from the order dismissing an action in order to start the time for appeal. Without that entry of judgment, the district court does not lose jurisdiction. *See Allah v. Superior Court of State of Cal.*, 871 F.2d 887, 890 (9th Cir. 1989).

Therefore, although the court would have concured with the Magistrate's recommendation if judgment of dismissal incorporating the settlement agreement had been entered, the fact that it was not means that this court never lost jurisdiction and may proceed to determine whether the settlement agreement has been breached.

B. Breach of Settlement Agreement.

The court also concurs with the Magistrate's recommendation that an implied condition of paragraph 9 of the Settlement Agreement is that plaintiff submit to a "fitness for duty exam" in order to determine whether plaintiff was fit to return to work. Consequently, the court concludes that the Settlement Agreement was not

breached when plaintiff was required to undergo an examination by a mental health professional.

ACCORDINGLY, IT IS ORDERED that defendant's Motion to Enforce Settlement Agreement and Petition for Instruction is granted.

IT IS FURTHER ORDERED that the judgment for defendant entered on June 28, 1994 is vacated.

Dated: July 10, 1995

/s/ Robert E. Coyle
ROBERT E. COYLE
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LYDIA MARY MORAN, Plaintiff-Appellant v. COUNTY OF TULARE, Department of Health Services, Defendant-Appellee.	No. 95-16367 D.C. No. CK-92-06694-REC Eastern California (Fresno) ORDER (Filed April 23, 1997)

Before: HUG, Chief Judge, SCHROEDER and TASHIMA, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

§ 2000e, Definitions

For the purposes of this subchapter –

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any

agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization –

> **(1)** is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.];
>
> **(2)** although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or
>
> **(3)** has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of

employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, on an appointee on the policy making level or an immediate advice with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or

between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.], and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United Sates, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not

require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided,* That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

(Pub.L. 88-352, Title VII, § 701, July 2, 1964, 78 Stat. 253; Pub.L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662; Pub.L. 92-261, § 2, Mar. 24, 1972, 86 Stat. 103; Pub.L. 95-555, § 1, Oct. 31, 1978, 92 Stat. 2076; Pub.L. 95-598, Title III, § 330, Nov. 6, 1978, 92 Stat. 2679; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095; Pub.L. 102-166, Title I, §§ 104, 109(a), Nov. 21, 1991, 105 Stat. 1074, 1077.)

LITA O'NEILL BLATNER #041996
County Counsel of the County of Tulare, and
KATHLEEN BALES-LANGE,
Deputy County Counsel #094765
2900 W. Burrel, County Civic Center
Visalia, California 93291
Telephone: (209) 733-6263

Attorneys for Defendant, County of Tulare

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

LYDIA MARY MORAN Plaintiff, v. TULARE, COUNTY OF, DEPARTMENT OF HEALTH SERVICES Defendants.	Case No. CV-F-92-5694 REC MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND PETITION FOR INSTRUCTION [FRCP 54 (C)] (Filed Apr. 5, 1995) Date: May 1, 1995 Time: 10:00 a.m. Courtroom:

Defendant, COUNTY OF TULARE, by and through its attorneys, provides the following points and authorities in support of its Motion to Enforce Settlement Agreement and Petition for Instruction:

BACKGROUND

Plaintiff Lydia Moran filed a complaint against Defendant County of Tulare in October of 1992[1], alleging that the County of Tulare had discriminated against her because of her ancestry [Hispanic]. That complaint was thereafter amended in response to Defendant's Motion. A Motion to Dismiss the Amended Complaint was pending at the time that this action was settled.

Settlement of this action was reached in open court on June 10, 1994, and was approved by Magistrate Judge Dennis Beck. Thereafter, the settlement was reduced to writing. [See Declaration of Kathleen Bales-Lange.]

The settlement contained two basic provisions: payment of money to Plaintiff, and establishment of a bilingual services policy by the County. The County was to use all best efforts to have a policy in place by June 10, 1995. [See Exhibit A to Declaration of Kathleen Bales-Lange.]

Also in the agreement was a restatement of Plaintiff's existing right to reinstate to her employment [paragraph 9 of the Agreement].

The sums required to be paid to Plaintiff have been paid. [See Declaration of Pamela J. Rutherford, Declaration of Travis Steagall.] Preparation of the bilingual services policy is in process. [See Declaration of John Rodriguez.]

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[1] Mrs. Moran also filed a virtually identical action in state court. [Tulare County Superior Court No. 155743]

In November of 1994, Plaintiff appeared at the Personnel Department with a slip from a physician stating she could return to work. The statement was signed by Dr. Miyakawa [See Declaration of Kathleen Bales-Lane, Exhibit F.] [See Exhibit G of Declaration of Kathleen Bales-Lange.]

Since Plaintiff had left her employment and filed a Workers' Compensation claim alleging she was disabled due to a psychological condition, Jim Brinkerhoff, Tulare County Personnel Director, directed that Plaintiff must be given a fitness for duty examination. This direction was in accord with general policy of the County Personnel Department. [See Declaration of Jim Brinkerhoff.]

Plaintiff was examined by Dr. Bruce Reed, a psychologist licensed to practice in the State of California. Doctor Reed submitted a written report indicating that Plaintiff was not fit for duty. [See Declarations of Jim Brinkerhoff and Vernon Ribeiro.]

Plaintiff was advised of Doctor Reed's report. [See Declarations of Kathleen Bales-Lange and Vernon Ribeiro.] Plaintiff subsequently hired an attorney to press for her claim for reinstatement. Mr. Brinkerhoff, at the request of Plaintiff's attorney, advised Plaintiff of her administrative remedy. In a case where the employee's doctor and the County's doctor disagree as to the employee's fitness, the county sends the employee to a third doctor for an opinion. That third opinion then becomes the "tie breaker" and will determine whether the employee is fit for duty. The "tie breaker" doctor is selected by the County. However, since Mr. Brinkerhoff had been previously advised by Ms. Bales-Lane that Mrs.

Moran believed he had interfered with her examination by Doctor Reed, Mr. Brinkerhoff instructed Ms. Bales-Lange to advise Mrs. Moran's attorney that in her case he would deviate from the usual practice and provide Mrs. Moran with a list of doctors from which she could choose. [See Declaration of Jim Brinkerhoff.]

Plaintiff severed her relationship with her attorney and wrote directly to County's attorney. In that letter she indicated she was not willing to proceed with her administrative remedy, and that she intended to file a separate action against the County, Jim Brinkerhoff and Robert Atwood for breach of the settlement agreement if she was not immediately reinstated. [See Exhibit F to Declaration of Kathleen Bales-Lange.]

LEGAL AUTHORITY

I.

MEDICAL SAFETY TO WORK IS A REASONABLY IMPLIED CONDITION OF REINSTATEMENT TO EMPLOYMENT.

A settlement agreement is essentially a contract. Under California law, those terms which are necessary to make a contract reasonable, or are necessary to carry it into effect, are implied conditions. [Labor Code sections 1655, 1656]

All employers in California are required by statute to provide employment for employees which is free from danger to the life, safety or health of those employees [Labor Code section 6306 subdivision (a)]. Further, under common law, an employer has a duty to furnish an

employee with a reasonably safe work place in which to work. [*Devins v. Goldberg* (1948) 33 Cal.2d 173]

Since all employers are legally required to ensure their employees are provided employment which is medically safe, it is a reasonably implied condition of the agreement to reinstate Plaintiff that it be medically safe that she be reinstated.

II.

THE COUNTY HAS NOT BREACHED THE SETTLEMENT AGREEMENT.

Assuming that medical safety is an implied condition of the settlement agreement with Plaintiff, County has not breached the agreement. Plaintiff left work due to a psychological condition. When she requested to be reinstated, she presented a brief evaluation from a general practitioner clearing her to return. County exercised its legal duty to ensure that Plaintiff could safely return to work, and had her examined for fitness for duty by a licensed psychologist. That psychologist determined that she was not fit for duty. Plaintiff has refused to exercise her appeal right to a third opinion from a "tie breaker" physician.

County has done all it is reasonably required to do pursuant to the agreement and its implied conditions. County should not be threatened with lawsuits for its actions.

III.

THE COUNTY IS ENTITLED TO A FINDING FROM THE COURT THAT IT HAS COMPLIED WITH THE SETTLEMENT AGREEMENT.

The County and its attorneys regret having to bring this to the court's attention and consume the court's time with this matter. However, the County's attempts to resolve this matter informally have been unsuccessful, and the County must request the protection of the court to avoid even more costly and senseless litigation by Plaintiff.

The County has attempted in good faith to comply with all terms of the settlement agreement. In return County staff have been accused by Plaintiff of conspiring to falsify information to make an example of Plaintiff, and County taxpayers are threatened with yet another lawsuit.

This court retains jurisdiction over this settlement. We request that this court find that the County has complied with the terms of the settlement, with the exception of the implementation of the bilingual services plan. In the unlikely event that the court finds that the County is in breach of the agreement, we request that the court reinstate Plaintiff's action. Since the County has already paid Plaintiff pursuant to the agreement, we further request judgment in our favor against Plaintiff in the amount paid, twenty five thousand dollars, plus interest. County contends that this court has this inherent power, and further that this power exists pursuant to Federal Rule of Civil Procedure Rule 54 subdivision (c).

CONCLUSION

For the foregoing reasons, County requests that this court find that County has complied with the settlement agreement.

Dated: 4-4-95

Respectfully submitted,

LITA O'NEILL BLATNER
County Counsel

By /s/ Kathleen Bales-Lange
Kathleen Bales-Lange
Principal Attorney

Attorneys for COUNTY

County of Tulare *Personnel*

DEPARTMENT

December 19, 1994

Lydia M. Moran
1270 N. Laspina
Tulare, CA 93274

SUBJECT: Your letter of December 8, 1994 (Received December 12, 1994)

I have read and considered your letter, reviewed the attached documentation and discussed your situation with Employee Relations and Risk Management staff. I can understand your reaction to the emphasized statement *"directly ordered"*. The strong emphasis on this statement is not intended to imply any lack of cooperation on your part. We have had to add that emphasis as a standard practice because of past problems with others. We just want to clearly communicate and to make sure the importance of this appointment is emphasized.

A fitness for duty evaluation is standard practice under the circumstances of your return. Its purpose is to insure that you are indeed able to perform the core duties of the job and that doing so will not jeopardize your health and further recovery. As soon as that has been confirmed we will begin certifying you to departments for consideration for reinstatement.

We regret that this process is time consuming, but it is necessary. I have directed staff to expedite the process to ensure a response to you at the earliest possible date.

Sincerely,

/s/ Jim Brinkerhoff
Jim Brinkerhoff
Personnel Director

cc: Thomas F. Campanella
Vern Ribeiro
Kathy Bales-Lange

LYDIA MARY MORAN
1270 NORTH LASPINA
TULARE, CA 93274
Telephone (209) 685-8430

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

LYDIA MARY MORAN Plaintiff v. TULARE, COUNTY OF DEPARTMENT OF HEALTH SERVICES Defendants.	Case No. CV-F-92-5694 REC PLAINTIFF RESPONDS TO MOTION TO ENFORCE SETTLEMENT AGREEMENT AND PETITION FOR INSTRUCTION [FRCP 54 (C)] Date: May 1, 1995 Time: 10:00 a.m. Courtroom:

Comes now plaintiff, Lydia Mary Moran in pro per:

1. Plaintiff LYDIA MORAN [hereinafter "plaintiff] and Defendant COUNTY OF TULARE [hereinafter "County"] entered into a Settlement Agreement dictated into the record and approved by Magistrate Judge Dennis L. Beck on June 10, 1994.

2. Thereafter, said Settlement Agreement was formally reduced to writing and agreed to by both parties. A true copy of said written Settlement Agreement along with global Workers' Compensation claim is attached as Exhibit A to the Declaration of Kathleen Bales-Lange,

submitted with original motion. Magistrate Judge Beck retains jurisdiction over the Settlement Agreement until such time as the bilingual services plan has been implemented.

3. COUNTY contends that it has complied with the terms of settlement agreement as follows:

A. COUNTY has paid PLAINTIFF the amounts due and owing under paragraph 1 of the Agreement. [See Declaration of Pamela J. Rutherford, Declaration of Travis Stegall, both with the original Motion.

B. COUNTY alleges to have commenced preparation of a bilingual services policy as required by paragraph 2 of said Agreement. Said policy is allegedly scheduled to be completed on or before June 10, 1995. [See Declaration of John Rodriguez, submitted with original Motion. PLAINTIFF has requested signed documents of ALL COUNTY employees who took Language Survey between July 3, 1994 and July 16, 1994 to confirm truthfulness of Mr. Rodriguez's Declaration.]

4. In November of 1994, PLAINTIFF requested reinstatement to her employment pursuant to paragraph 9 of said Settlement Agreement. In support of this request, PLAINTIFF submitted a statement from Doctor Miyakawa stating she could return to duty, [See attached medical release from Doctor dated November 7, 1994]

5. PLAINTIFF was ordered to undergo a fitness for duty examination conducted by Bruce T. Reed, a psychologist licensed to practice in the State of California. Dr. Reed subsequently rendered a subjective opinon [sic] that PLAINTIFF was not fit for duty due to her psychological

condition. A true copy of Dr. Reed's report is attached as Exhibit B to the Declaration of Vernon Ribeiro supporting the original Motion. PLAINTIFF is requesting that all the test material that she was administered by Dr. Reed be provided to the court for review.

6. PLAINTIFF has refused to use the administrative appeal system utilized by the COUNTY to resolve a dispute between two doctors regarding an employees fitness for duty because this was not part of the Settlement Agreement.

7. COUNTY contends that a reasonably implied condition of Settlement Agreement insofar as it related to PLAINTIFF'S reinstatement is that PLAINTIFF be medically able to safely perform the duties of her employment.

8. PLAINTIFF contends that such a condition is not a condition of the Settlement Agreement, and further contends that COUNTY has breached said AGREEMENT by refusing to reinstate PLAINTIFF unless and until PLAINTIFF is found fit for duty. [See Exhibit F to Declaration of Kathleen Bales-Lange]

9. COUNTY has attempted to resolve said dispute informally with PLAINTIFF and has been unsuccessful to date due to COUNTY'S insistence on reinstatement procedures not agreed to in the original Settlement Agreement of June 10, 1994.

WHEREFORE, PLAINTIFF requests as follows:

1. That this court find that COUNTY has not complied with terms of the Settlement Agreement regarding reinstatement to the date this Motion is heard.

2. If the court finds that COUNTY is in breach of the Settlement Agreement, that this court issue the following orders:

a. PLAINTIFF is entitled to a judgement in the amount of seven hundred fifty thousand dollars in damages for retaliation and harassment against COUNTY and for their "expert doctor" (Doctor Reed's subjective opinion) which has seriously damaged my future employment opportunities.

3. For such other remedy as the court deems just and proper in the premises.

Dated: 4-19-95

Respectfully submitted,

By /s/ Lydia Mary Moran
Lydia Mary Moran
In pro per